No. 11953

United States
Court of Appeals
for the Ninth Circuit

EMMA GRACE LOWE,

Appellant,

vs.

UNITED STATES SMELTING, REFINING, AND MINING COMPANY, a corporation, FIRST NATIONAL BANK OF FAIRBANKS, Executor of the Estate of Gustaf Soderblom and WALTER JENSEN,

Appellees.

Appellant's Opening Brief

Appeal from the District Court of the United States for the Territory of Alaska, Fourth Judicial Division.

Honorable Harry E. Pratt, District Judge

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APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

These are two suits to quiet title brought under Section 4001, Compiled Laws of Alaska, brought in support of adverse claims, filed in the Land Office (see Title 30, Section 30, and Title 48, Section 386, U. S. C. A.). Case No. 5493 involves the so-called Snow Shoe Fraction claim (Pages 2 and 3, Transcript of Record) and Case No. 5494 involves the so-called L. Association placer claim, (Pages 6 and 7, Transcript of Record) both situated on Fish Creek, a tributary of the Little Chena river in the Fairbanks Recording Precinct, Territory of Alaska. The two cases were put at issue by filing answers (Pages 10 to 27, Transcript of Record)

and replies thereto (Pages 26 to 31, Transcript of Record.) The two cases were consolidated for purpose of trial and tried by the Court with an advisory jury, resulting in a decree quieting title in favor of the plaintiffs-appellees (Pages 63 to 67, Transcript of Record) from which the defendant-appellant has appealed to this Court. The authority for the appeal is of course found in Title 28, Section 225, U. S. C. A. as amended. Notice of Appeal, Petition for Allowance of Appeal, Assignment of Errors and Order Allowing Appeal and Fixing Amount of Bond appear at Pages 67 to 87, Transcript of Record, and the Citation on Appeal, Praecipe for Transcript of Record, Appeal Bond and Order approving the same, appear on Pages 136 to 142, Tr. R. This being an appeal from a District Court of the Territory of Alaska, the old procedure was followed.

It is submitted that the record is ample to sustain the jurisdiction of this Court and to authorize the Court to determine the points hereinafter mentioned, as well as various other matters raised in the Lower Court but not, for the reasons hereinafter set forth, now deemed of controlling importance on this appeal. Inasmuch as we believe no particular contentions will be urged regarding the jurisdiction of the Lower Court to hear these cases or the jurisdiction of this Court over the appeal, no further space will be devoted to this aspect of the matter.

STATEMENT OF THE CASE

The locations of the L Association and Snow Shoe Fraction claims, under which appellees claim, were both made in 1908. (Pages 2, 3, 7, 13 and 22, 23, Transcript of Record) The adverse locations of the Scorpion Association, Jupiter Association and Saturn placer claims (Mineral Survey No. 2105) under which appellant claims, and covering in part the same ground, were made in 1941. Appellant contends that the L Association and Snow Shoe Fraction locations had been forfeited for failure to do the annual assessment work during many of the fiscal years which intervened between the date of their location, 1908 and 1940, (See Pages 14 to 18 and 23 to 26, Transcript of Record.) Appellees contend, and the District Court sustained their contention, that the so-called "Waskey Act" (34 Stat. 1243, Title 48 U. S. C. A., Sec. 384) was impliedly repealed by the 1938 Amendment to Title 48, Sec. 381, U. S. Code Annotated, which among other things provides the laws of the United States relating to mining claims, mineral locations, and rights incident thereto, are extended to Alaska, so that the absolute forfeiture for failure to do assessment work provided for in the Waskey Act is no longer effective. This is the principal point involved on this appeal. It was raised in various ways in the Distrct Court, among others as follows:

(A) By motions for non-suit at the close of plaintiff's case in chief, Assignments of Error No. V and VII (Page 75, Tr. of Rec.) IX (Page 76 Tr.), LXX (Pages 81 and 82, Tr.), Exception No. 1 (Pages 88 to 90 Tr.)

(B) By rulings on and exclusion of evidence and denials of offers of proof. See Assignments numbered XVII and XVIII (Page 77 Tr.) XIX (Page 78 Tr.) LVII (Page 80 Tr.) C, CII, CXXI, CXXIII, CXXIV (Pages 82 to 84, Tr.) Exceptions numbered 1, 2, 3 (Pages 88 to 100 Tr.) and 8, (Pages 116 to 131 Tr.)

(C) By motions for non-suit and directed verdict at the close of all the evidence. See Assignments numbered XI, XII, (Page 76, Tr.) XXV, XXVI, (Page 79 Tr.) L and LI (Page 80, Tr.) Exception No. 4, Pages 100 to 102 Tr.

(D) By request for instructions and objection to instructions given. See Assignment XIV, XV and XVI (Page 77 Tr.) Exception No. 5, Pages 102 to 111 Tr.

(E) By motions for judgment notwithstanding the verdict Pages 49 to 53 Tr., Assignment No. XIII (Page 76 Tr.) Exception No. 6, Pages 111 and 112 Tr.

(F) And by objections to the findings and con-

clusions and decree. See Assignments XX, XXI and XXII (Page 78 Tr.) XXVII (Page 79 Tr.) XXVIII, XXIX (Page 80 Tr.) and CXXXI (Page 85 Tr.) Exception No. 7, Pages 112 to 116 Tr.

These Assignments and Exceptions all deal with one aspect or another of the same point, the question of the implied repeal of the Waskey Act and its effect. Appellant's contentions in this regard were urged upon the Trial Court a dozen or more times in almost as many different ways. We believe that no claim will be urged by appellees but that this was the principal point involved in the case and repeatedly raised and argued to the Court throughout the trial. After the trial and the rendition of the jury's verdict, the trial judge, being in doubt as to his ruling upon these and other points, requested briefs from counsel for the respective parties, which were furnished, and in due course rendered a written opinion which is set forth, so far as material here, on Pages 144 to 165, Transcript of Record. The writer now finds that this opinion was reported in 74 Fed. Supp. 917. It will, we believe, be simpler and perhaps avoid confusion if we simply refer to the pages of the printed report than to the Transcript of Record.

In submitting this brief we will discuss the Court's opinion in some detail and endeavor to point out the

respects in which we believe the trial judge erred. Appellant's contentions on this matter of implied repeal are set out in the statement of points to be relied upon (Pages 168-169 Tr.) as follows:

(1) That the Waskey Act was not repealed by the 1938 Amendment to the 1900 Statute because the 1938 Amendment was not a new enactment, making the General Mining Laws applicable to Alaska, but such provision was merely copied word for word from the Act of 1900 without change, the changes being with regard to entirely different provisions of the law. (Mining on Tidelands, etc.)

(2) Even if the Waskey Act had been impliedly repealed in 1938, such repeal would not affect rights and status that had accrued and become vested prior to the repeal, and would in no way revive locations such as the ones involved here that had become void for failure to do assessment work during the period when the Waskey Act was in force.

(3) Even if the automatic forfeiture provisions of the Waskey Act were impliedly repealed by the 1938 Amendment, such implied repeal would not affect the other and separate provisions of the Waskey Act dealing with the filing of proofs of labor and the presumption of non-performance arising from failure to file.

These three points will be discussed separately un-

der appropriate sub-heads as the first three propositions in this brief.

There are two other collateral matters involved. First is the matter of variance in and sufficiency of the description of the Snow Shoe Fraction claim (Case No. 5493); see Assignment of Error numbered XXVII (Page 79 Tr.) XXVIII (Page 80, Tr.) Exception No. 9 (Pages 131 to 133, Tr.) As described in the complaint and as staked on the ground (Page 3, Tr.) the Snow Shoe Fraction was supposed to cover ten acres of land 350 feet wide by 1500 feet long. The recitals of the adverse claim and proof disclosed that as now held, it, in fact, covers as vacant land only a small triangle containing approximately one-fourth of that area, or two and one-half acres. (Page 132, Tr.) The reason for the discrepancy lies in the fact that the boundaries of the claim as originally staked overlapped in large part certain prior locations known as the Miller Bench and Lulu and perhaps others, which then subsequently went forward to patent. The only vacant ground subject to appropriation by the Snow Shoe Fraction location at the time it was made is this small area of two and a half acres and the question appellant desires to raise by this point is whether, disregarding any technical matters of pleading, the location made in this manner can be sustained.

The last proposition urged by appellant is the ques-

tion of the propriety of allowing attorneys' fee under the circumstances. See Assignment numbered CXXX (Pages 85, Tr.) Exception No. 12, (Pages 133-4, Tr.) No allegation regarding or mention of attorney fees appears in either complaint (Pages 2 to 5 and 6 to 10, Tr.) No evidence was offered regarding attorneys' fees on the trial. (Page 133 Tr.) The Court, nevertheless, inserted of its own motion, in Paragraph 9 of the findings, recital that a "reasonable sum to be allowed the plaintiffs as attorneys' fee herein is the sum of $500.00," and inserted said amount in the decree. Appellant contends that in order for attorneys' fees to be allowed the amount of the fee must be supported by pleadings and proof.

In fairness to Mr. Bell, the attorney who tried these cases in the District Court, the following statement should perhaps also be made. During the trial, which consumed some eight days, a large number of additional matters were raised and are referred to in the Assignments of Error. The writer has disregarded all such Assignments, and the matters supporting them, in preparing this record on appeal, not because they do not possess merit, because in the writer's opinion many of them do, but because as we view the record, their inclusion here is both unnecessary and undesirable. Aside from the two collateral matters of the sufficiency of the Snow Shoe Fraction location and the

propriety of allowing attorneys' fees, the controlling question involved here is the implied repeal of the Waskey Act. If the Waskey Act and all rights and presumptions arising under it were completely wiped off the books in 1938, as the Trial Court ruled, then such matters as the motion for mistrial and other errors which would merely result in a new trial become unimportant because, under the general doctrine of resumption of work, if applicable, the result of any second trial would inevitably be the same as the first. To make this clear, while there was a complete failure to do assessment work or to file proofs of labor evidencing it, during many of the years intervening between 1909 and 1939, and the propriety of the claimed improvements shown in some of the proofs of labor may be subject to question; (See for instance the brushcutting claimed for 1938-39, Page 117 Tr. and the stripping moss for 1939-40, Page 120 Tr.) it seems quite clear that work was resumed at least during the fiscal year July 1, 1940 to 1941. The development work claimed during that year, prospect drill holes, (Page 122, Tr.) appears proper and sufficient in amount. Accordingly, if appellant's contentions regarding the implied repeal should be denied, it would not seem to her advantage to secure a reversal upon any other ground, because her case (apart of course from the questions of the sufficiency of the Snow Shoe location and the matter of attorneys' fees) is lost in any event and a new

trial would only result in added and needless expense. On the other hand if either of the appellant's contentions regarding the Waskey Act are sustaained, then she has won her case, because as hereafter more fully appears there was a total failure to file proofs of labor during many years intervening between 1909 and 1938 (Exception No. 4, Pages 100-102 Tr.) and no attempt was made by appellees to show the performance of annual labor during such years, so that if the Waskey Act was not completely wiped out, appellant's motions for non-suit and directed verdict made at the close of all the testimony should have been granted. Also, since, as stated, there were so many years when no proofs of labor or suspension notices were filed at all, it seems unnecessary to devote time to a consideration of the legal sufficiency of some of the suspension notices or the eligibility of certain of the claimants therein to claim exemption (see 74 Fed. Supp. Pages 927 to 929, Points 18 to 26) or the sufficiency of the improvements claimed in certain of the proofs of labor to comply with the Statute. (74 Fed. Supp. p. 929) In other words, if we get to the point of determining that the Waskey Act is still in force, then there are so many years in which there has been a complete failure of performance that we do not have to concern ourselves with those years when there has been an attempt at performance, insufficient or otherwise.

APPELLANT'S FIRST PROPOSITION

(The Waskey Act was not repealed by the 1938 Amendment to the 1900 Law because the Amendment was not a new enactment on the subject.)

SUMMARY OF POINTS AND AUTHORITIES INVOLVED

I.

There is a strong presumption against implied repeals.

59 Corpus Juris, Title "Statutes", Sec. 510, Pages 905 to 908;

Crawford on Statutory Construction (1940) Sec. 309 and 310, Pages 629 to 631;

Posadas vs. National City Bank, 296 U. S. 497 on 503, 56 Supreme Court, 349 on 352;

State ex rel vs. Malheur County Court, 54 Oregon, 255 on 262 (101 Pacific 907)

II.

An amendatory Act which merely re-enacts without substantial change the provisions of a former law does not repeal an intermediate act which had amended, qualified or limited the first one, but the intermediate act will be deemed to remain in force and to amend or modify the new act in the same manner as it did the first.

50 American Jurisprudence, Title "Statutes", Sec. 563, Page 558;

Eddy vs. Kinkaid, 28 Oregon 537 on 562-3 (41 Pacific 157);

Small vs. Lutz (67 Pacific 421);

Bayless vs. Douglas County, (57 Oregon 301 on 304) 111 Pacific 384.

III.

Where a statute is amended "to read as follows" the provisions of the original law which are copied either word for word or in substance into the new enactment are not deemed re-enacted or a new expresson on the subject but are considered to be a part of the former law and to have remained in force without change all along.

Sutherland on Statutory Construction (Horacks 3rd Edition) Sec. 1933, Pages 425 to 428;

59 Corpus Juris, Sec. 527, Page 925;

Posadas vs. National City Bank 296 U. S. 497 on 499 et seq. (56 Supreme Court Reporter 349);

Great Northern Railway Company vs. U. S. (CCA 8th) 155 Fed. 945 on 947 et seq.;

In re. Wilson (56 Pacific 2nd 733) 105 A. L. R. 367 on 375;

George v. Asheville, 80 Federal 2nd 50, 103 A. L. R. 568 on 577;

Noonan v. City of Portland, 161 Oregon 213 on 250 to 251 (88 Pacific 2nd, 808);

Stingle v. Nevel, 9 Oregon 62;

Eddy v. Kinkaid, 28 Oregon 537 on 562-3 (41 Pac. 157);

Bayless v. Douglass County, 57 Oregon 301 on 304 (111Pac. 384);

Renshaw v. Lane County Court, 49 Oregon 526 on 529-30 (89 Pac. 147);

State v. McGinnis, 56 Oregon 163 on 165 (108 Pac. 132);

City of Woodburn v. Aplin, 64 Oregon 610 on 618-619 (131 Pac. 516);

State v. Malheur Co. Court, 54 Oregon 255 on 262, (101 Pac. 907);

State v. Cochran, 55 Oregon 157 on 166 (104 Pac. 419);

State v. Schluer, 59 Oregon 18 on 41 (115 Pac. 1057);

Rosa v. Bandon, 71 Oregon 510 on 513, (142 Pac. 339);

5 Annotated Cases 203, 88 American State Reports 276.

IV.

State v. Lightner does not conflict with the above rule.

State v. Lightner 77 Oregon 587, 152 Pacific 232.

ARGUMENT

Section 381, Title 48, U. S. Code Annotated, was

Section 26 of Chapter 786 of the Law of June 6th, 1900, making further provision for the government of Alaska, commonly known as the Alaska Act. (31 Statutes 329). The first clause of this Section reads, "The laws of the United States relating to mining claims, mineral locations, and rights incident thereto, are hereby extended to Alaska."

Then, in 1907, Section 384, Title 48, U. S. Code Annotated, commonly known as the Waskey Act, was enacted. (34 Statutes 1243) This act provided for the filing of proofs of labor and prescribed the contents thereof. It states, "Such affidavit shall be prima facie evidence of the performance of such work or making of such improvements, *but if such affidavits be not filed within the time fixed by this Section the burden of proof shall be upon the claimant to establish the performance of such annual work and improvements. And upon failure of the locator or owner of any such claim to comply with the provisions of this Section, as to performance of work and improvements, such claims shall become forfeited and open to location by others as if no location of the same had ever been made.*" The General Mining Laws of course permit the resumption of work after default in the performance of assessment work and before an adverse location, so that this last clause, providing as it did for an absolute forfeiture of the location upon failure to do the work for any year was held in Thatcher v. Brown (CAA 9th Cr.) 190 Fed.

708 on 711, to amend and modify Section 381 to that extent. This ruling was then confirmed in the later case of Ebner Gold Mining Co. v. Alaska-Juneau Gold Mining Co., (CCA 9th Cr., 210 Fed. 599 on 604.) Then in 1938 Congress amended Section 381 Title 48 U. S. C. A. (52 Statutes 588) This Section was amended "to read as follows" and then the full Section was set out, including the new matter desired to be inserted, which had to do with mining on or below tidewater lands. The clause, "The laws of the United States relating to mining claims, mineral locations, and rights incident thereto are extended to the Territory of Alaska" was merely copied into the Amendatory Act from the original enactment without change. (See 74 Federal Supplement Page 921.)

Appellant contends that under such circumstances the Waskey Act was not impliedly repealed by the 1938 Amendment. In appellant's brief, submitted to Judge Pratt in the lower court, the citation from 50 American Jurisprudence, Page 558, Sec. 553, quoted at the top of Page 921, 74 Federal Supplement, was submitted. The reason for this rule is admirably and clearly stated in the case of Allison v. Hatton, 46 Oregon 370 on 372, 80 Pacific 101, as follows, "The rule is, that where a section of the Statute is amended so as to read 'as follows; and the section is then set forth with the changes intended to be made, *those portions of the old section that are merely copied into the Amendment without*

change are not to be considered as reenacted or as a new statement of the law, but are to be read as a part of the earlier statute, if in conflict with another law passed after the section amended and before the Amendatory Act, unless there is a clear manifestation of legislative intention to the contrary... In the absence of such an intention, it is the changes or additions incorporated in the section amended only, that are to be considered enacted. This doctrine has been several times applied by this Court and is supported by the authorities. (Citing cases)" Judge Pratt refers in his opinion (74 Fed. Supp. 922) to Eddy v. Kinkaid (28 Oregon 537, 41 Pac. 156). We quote the following from that case. "But a sufficient answer to this contention is that the section of the Australian Ballot Law relied upon by the defendant is not a new legislative declaration, but is merely a reenactment of the provisions of the law that existed long prior to the creation of the Board of Railway Commissioners and therefore does not repeal by implication any provision of that Act, *even if it is in conflict therewith*: Endlich on Interpretation of Statutes, Sec. 195." To these cases could be added a long line of other Oregon decisions, announcing the same rule. See Bayless v. Douglas County, 57 Oregon 301 on 304 (111Pac. 384); Small v. Lutz, 41 Oregon 570 on 572, (67 Pac. 421); Renshaw v. Lane County Court 49 Oregon 526 on 529-30 (89 Pac. 147); State v. McGinnis, 56 Oregon 163 on 165 (108 Pac.

132); Stingle v. Nevel, 9 Oregon 62; City of Woodburn v. Aplin, 64 Oregon 610 on 618-19 (131 Pac. 516): State v. Malheur Co. Court, 54 Oregon 255 on 262, (101 Pac. 907); State v. Cochran, 55 Oregon 157 on 166 (104 Pac. 419); State v. Schluer, 59 Oregon 18 on 41 (115 Pac. 1057); Rosa v. Bandon, 71 Oregon 510 on 513.

Space does not permit extended quotations from all of these cases but all of them will be found to expressly assert and reaffirm the rule herein contended for. The following brief quotations should suffice to establish this, "Statutes are often reenacted, in which case they are not considered as new laws, but relate back to the former law on the same subject as against intermediate legislation (59 Oregon 41)." "The contention is that the Acts of 1899 and 1901 with reference to procedure on appeal operated to repeal by implication the provision of the statute making surety companies qualified sureties in undertakings on appeal. A sufficient answer to this position is that the provisions in the Act amending Section 537, in reference to the qualifications of sureties on appeal bonds, is not a new legislative declaration on the subject, but merely a reenactment of the law as it stood long prior to the Act authorizing surety companies to do business in the state and is therefore not in conflict with the later Act and does not operate to repeal it." (41 Oregon 572). "The amendment of the Charter by the

legal voters not having made any alteration in that part of the enactment on February 7, 1899, relating to the number of sureties on a bond executed in the city of Woodburn, the parts of the earlier Charter which were copied without change into the amendment which was adopted April 27, 1909, *are not to be regarded as a new statement of the law*, but are to be read as a portion of the earlier Charter, and hence subject to and controlled by the provisions of Section 6 of the Act of February 20, 1899, authorizing a surety company to execute to a municipal corporation a valid bond. (Citing many cases)" (64 Oregon 618)

It will be noted from the above authorities that the reason underlying the rule that the mere copying of a provision of a former statute into an amendatory act will not affect an intervening statute which has modified or superceded a portion of the original law is that under such circumstances the copied material is not deemed as a new declaration by the legislature or other governing body upon the subject, but is treated as merely a continuation of the former law, without change. In other words, as to such copied portion, the law remains the same as it was all along, and if that law has been modified or superceded by any intermediate enactment, it still remains modified and superceded in the same way it was before. Stating it another way, such an amendment and copying is deemed to indicate an

intention merely to reaffirm the law as it was before, whatever that may have been, rather than to change the pre-existing law.

Judge Pratt disregards these Oregon cases with the following statement. "While a few of the Oregon cases adhered to the intermediate amendment rule, the Supreme Court of Oregon definitely refused to follow the rule in the case of State ex rel. Brady v. Lightner, 1915 77 Oregon 587, 152 Pacific 232, 233." He then goes on to discuss this case and concludes, "This case involves the same situation which confronts us in the present case and it, in effect, overrules all prior Oregon cases to the contrary. (77 Fed. Supp. 922)" It is respectfully submitted that the Judge has misconstrued the decision in State v. Lightner. In the first place, it may be pointed out that there was in existence at that time a long line of earlier case uniformly announcing the rule as above set out and if the Court had intended to make such a drastic change in the law it seems extremely likely that some mention of the earlier cases and a statement to that effect would be found in the decision. Nothing of that kind of course appears. In State v. Lightner we are not concerned with an earlier act, then a separate intermediate act modifying the earlier statute in some particulars and then a later amendment of the original act, copying and carrying forward certain provisions of it into the Amendatory Statute, but

rather two amendments to the same act adopted at the same session of the legislature. The first amendatory act, which took effect at 8:30 a. m. on February 23, 1915 (78 Oregon 588) contained certain provisions which were omitted from the second amendment which took effect at 9:55 a. m. on the same date, or an hour and twenty-five minutes later. Both acts purported to amend the same section of the statute and were complete in themselves. The Oregon Constitutions provides that in amending or revising an act, the act as revised or amended shall be set forth at full length. The Oregon Supreme Court accordingly in discussing the second act, which it concluded was the last expression of the legislature and so the law, states, "If it can be made larger by a proviso which the Court selects for itself out of a previous amendment upon the same subject, it is not set forth at length, and the constitutional provision will be violated. If the constitution is given any effect, Section 6313 as last amended is all of Section 6313 as it now stands. There can be but one Section 6313 of Lord's Oregon Laws. *It might have been different if the first amendment, instead of being an attempted amendment of Sec. 6313, had been an original law without reference to an amendment, but it is not* * * * *We do not have to deal, necessarily, with the question of a repeal by implication.* The later act expressly amends the section as it formerly existed and repeals a part of the former statute, and must be declared

to be the law." The distinction between that case and the one involved here is, of course, obvious. If the Waskey Act, instead of being enacted as a separate statute, had been enacted as an amendment to Sec. 381, and Congress then at a later date again amended the Section restoring the law to its former condition and eliminating the provisions of the Waskey Act,a situation similar to that in State v. Lightner would have been presented, but that is of course not the case. The Waskey Act was a separate enactment modifying and superceding part of the original law, and under the express rule as announced in the authorities previously discussed, a mere amendment of the original statute copying its provisions into the later act does not evidence any intention to change or supercede the intermediate act which had modified the first, but the law with its modifications was deemed to continue in force without change.

That the Oregon Supreme Court did not consider the earlier cases as having been overruled by State v. Lightner is amply established by the very recent Oregon case of Noonan v. City of Portland, (161 Oregon 213 on 250 to 251, 88 Pacific 2nd 808). "In the absence of a clear indication to the contrary, a statute which is incorporated within an amendatory act without any substantial or material change in its phraseology *takes its antiquity from its original enactment and is neither deemed repealed nor reenacted by being ncorporated in*

the amendatory act.

The principle is better stated in State v. McGinnis, 56 Oregon 163, 108 Pacific 132, from which we quote:

> ' "Whatever the rule may be in other jurisdictions, it is settled in this State that where a section of an act is amended 'so as to read as follows,' and the later law sets forth the changes contemplated, the parts of the old section that are incorporated in the new are not to be treated as having been repealed or re-enacted, but are to be considered as portions of the original statute, unless there is a clear declaration to the contrary, in the absence of which it is only the additions that have been made to the original section that are to be regarded as a new enactment.'

See to like effect Brun v. Lazzell, 172 Mr. 314, 191 Atl. 240, 109 A. L. R. 1453; In Re Wilson's Estate, 102 Mont. 178, 56 P. (2nd) 733, 105 A. L. R. 367; Duggan v. Ogden, 278 Mass. 432, 180 N. E. 301, 82 A. L. R. 765."

In addition to quoting and citing from the earlier decision of State v. McGinnis, previously mentioned as among the cases supporting (what Judge Pratt calls) the intermediate amendment rule, the Court will note a number of outside cases, all of which are reported in A. L. R. We direct attention particularly to In Re Wilson's Estate (Mont.) 56 P. (2nd) 733, 105 A. L.

R. 367.) We quote from page 375:

> "And it is a rule of statutory construction, universally applied, that if a section of a statute be amended, such part of the old as is retained and carried forward into the amended section *is not new* but is construed to have been the law at all times since it was first enacted."

Another case stating the general rule is George v. Asheville (CCA 4th Cr. 80 Fed. (2nd) 50, 103 A. L. R. 568) which is cited in support of the text in 50 American Jurisprudence 558. We quote from 577 of 103 A. L. R.: "And 'insofar as a later law is merely a re-enactment of an earlier one, it will not repeal an intermediate act which qualifies or limits the first one, but such intermediate act will remain in force and qualify or modify the new act in the same manner as it did the first.' 59 CJ 926, 927"

Judge Pratt points out that Oregon and some other States have constitutional provisions requiring that no law should be amended by reference to the title only, but that the law should be re-enacted and inserted at length in the new act. He then continues, "The part these constitutional provisions played in making said intermediate amendment rule is reflected in the cases on the subject. As Congress never had such limitations upon it, the rule cannot be of assistance in interpreting the intention of Congress as to an act." (74 Fed. Supp.

921) And, "construction of Acts of Congress never were aided by the intermediate amendment rule." (923) this is, we submit, a misconception not at all borne out by the authorities. Posadas v. National City Bank of New York, 206 U. S. 497, 56 Supreme Court 349, is one of the leading cases in the United States announcing the rule. Here is a case where the Supreme Court of the United States is construing an act of Congress. We quote from page 353 of the Supreme Court Reports (505 of the U. S.):

> "The amendment is made in a well approved form - a form which, indeed, many of the States compel by constitutional provision - namely, by repeating the language of the original section, with the additions to which we have heretofore called attention. Unless the contrary plainly appear, the employment of such form of amendment is simply to serve the causes of convenience and certainty, that is to say, that by carrying the full text forward, the task of searching out and bringing together the various fragments which go to make up the completed whole, after specific eliminations or additions by amendment, is rendered unnecessary; and possible doubt as to the precise terms of the law as amended is avoided. Or, as Chief Judge Denio said in Eli, et al, v. Holden, supra; 'In short, we attribute no effect to the plan of dovetailing the amendment into the original section, except the

one above suggested, of preserving a harmonious text, so that when future additions shall be published, the scattered members shall easily adjust themselves to each other.'

"It follows that such parts of the original section 25 as were copied into the amended section *were not thereby repealed and immediately re-enacted, but continued, uninterruptedly, to be the law after the amendment precisely as they were before.*"

To the same effect is Great Northern Railway Co. v. United States, C. C. A.,8th Cr. 155 Fed. 945 on Pages 947 et seq. This case contains an elaborate discussion of the rule and the reasons for it. We quote from Page 948:

"In the absence of a constitutional restriction —and there is none in the constitution of the United States, the amendment of existing statutes may be accomplished by either of these ways" (by amendment merely referring to the title, or by setting out the full section as amended 'so as to read as follows') "*and they have been employed interchangeably by Congress.*

Generally speaking, where a statute is amended 'so as to read as follows' or is re-enacted with changes, or is in terms repealed and simultaneously

re-enacted with changes, the amendatory or re-enacting act becomes a substitute for the original which then ceases to have the force and effect of an independent enactment; but this does not mean that the original is abrogated for all purposes, or that everything in the later statute is to be regarded as if first enacted therein. On the contrary, the better and prevailing rule is that so much of the original as is repeated in the later statute without substantial change is affirmed and continued in force without interruption, that so much as is omitted is repealed, and that any substantial change in other portions, as also any matter which is entirely new, is operative as new legislation."

In other words, while there is no constitutional restriction upon Congress requiring it to make amendments in this fashion, when it does, which is frequently the case, amend a statute by setting forth the full text "so as to read as follows" the same rules of construction apply to Congressional acts as to any other.

It may be noted in passing that Judge Pratt (74 Fed. Supp. 921) cites Sec. 230 of Lewis's Sutherland on Statutory Construction, (2nd Ed.) on the point that this method of amendment is frequently required by constitutional provision. It is noted that Sutherland supports the rule for which we are contending, Sec. 237 of the 2nd Edition, is quoted on page 948 of 155 Fed-

eral, and the following is from the 3rd Edition of Lewis on Statutory Construction by Horack:

> "Provisions of the original act or section which are repeated in the body of the amendment, either in the same or equivalent words, are considered a continuation of the original law. This rule of interpretation is applicable even though the original act or secton is expressly declared to be repealed. In some states this rule of interpretation has been enacted into law. The provisions of the original act or section is expressly declared to be repealed. held to have been the law since they were first enacted, and the provisions introduced by the amendment are considered to have been enacted at the time the amendment took effect." (Volume I, Sec. 1933, Page 425)

As far as the writer can determine, this rule is of ancient origin and appears to have been almost universaally adhered to. Attention is directed to the fact that the quotation from 50 American Jurisprudence Page 558 is supported by two annotations, 88 American State Reports, 276 and 5 Annotated Cases 203. The statement in 5 Annotated Cases 203 is as follows:

> "A later law which is merely a re-enactment of a former law does not repeal an intermediate act which has qualified and limited the first one, but the intermediate act will be deemed to remain in

force and qualify or modify the new act in the same manner as it did the first."

The American State Reports annotation uses substantially the same language.

Based upon the foregoing authorities we submit that it appears conclusively that Congress when it passed the 1938 amendment to the Act of 1900 evidenced no intention to and did not repeal the intervening Waskey Act which modified and limited in part the 1900 Statute, but instead, evidenced an intention to continue the law exactly as it was, excepting only for the changes expressly contemplated by the amendment which were "as to mining on and below tidewater land." In other words, by using this form of amendment the intention was to continue the law in its then condition with the intermediate Waskey Act in full force.

APPELLANT'S SECOND PROPOSITION

(EVEN IF THE WASKEY ACT HAD BEEN IMPLIEDLY REPEALED IN 1938, THIS WOULD NOT REVIVE LOCATIONS THAT HAD BEEN FORFEITED FOR FAILURE TO DO ANNUAL ASSESSMENT WORK WHILE IT WAS IN FORCE.)

SUMMARY OF POINTS AND AUTHORITIES

I.

The repeal of a statute will not operate to impair rights vested under it or to revive rights lost or taken away under the repealed statute.

59 Corpus Juris, Title "Statutes" Sec. 722 Page 1186 and Sec. 723, Page 1187;

Perkins Manufacturing Co. v. Clinton Construction Co. 295 Pacific 1, on Page 4.

ARGUMENT

This point is considered by the writer to be of much importance, although in view of the length to which this brief has grown, we will not devote too much space to it. Whether impliedly repealed or not in 1938, the Waskey Act was unquestionably the law of Alaska, very much in effect, from its passage in 1907 to its alleged repeal by implication in 1938, *or a period of 31 years.* The claims involved in these cases (the L Association and Snow Shoe Fraction) were located in 1908. From 1908 to 1938, at least, or a period of thirty years, the matter of performance of assessment work on these claims, and the effect of non-performance, were governed by the Waskey Act. Now, under the express terms of the Waskey Act: "Upon failure of the owner or locator of any such claim to comply with

the provisions of this act as to performance of work and improvements, such claim shall become forfeited and open to location by others as if no location of the same had ever been made." In other words, under the express provision of the Act, forfeiture is automatic. If the work is not done the location is gone.

Let us try to make our position clear. Assuming that the Waskey Act was impliedly repealed in May 1938, then upon failure to do the annual assessment work for the fiscal year ending at 12 o'clock meridian July 1st, 1938, or any subsequent year, the locator or owner of the claim might, by resuming work, before an adverse location, prevent a forfeiture (as in Oregon, and elsewhere) by virtue of the general mining laws. *But* if he failed to do the assessment work during any year prior to and including 1937 while the Waskey Act was in force, then under the express terms of the Act itself the claim was forfeited and void to the same extent as if no location had ever been made. In other words, the location became absolutely dead and no subsequent implied repeal of the Waskey Act or resumption of work thereafter could ever resurrect it or breathe life into it; that location is gone for good.

By the same token, even if we accept Judge Pratt's and appellee's theory that the clause of the 1938 Amendment, making the General Mining Laws applicable to Alaska, brought about the implied repeal of

the portion of the Waskey Act, which provides for the filing of proofs of labor and the effect of failure to file (something which we by no means concede, as hereafter appears, even if it effected such a repeal so far as the automatic forfeiture is concerned, so as to permit a resumption of work) it does not follow that we are to disregard these provisions of the Act entirely. Whether there was any provision for filing proofs of labor in Alaska after 1938 or not, there most certainly was a provision from 1908 to 1937. From 1908 to 1937 appellees and their predecessors were required to file proofs of labor and if they failed to do so *the presumption was that they did not do the work.* (See the discussion under appellant's third proposition.)

Again we concede that if the Waskey Act was impliedly repealed in 1938, and this provision fell with it, a failure to file proof of labor for 1938 or any subsequent year would bring about no adverse presumption, *but* no subsequent implied repeal could in any way change or affect the rights and liabilities which became fixed and vested in prior years. Whether required to file a proof of labor for years subsequent to 1938 or not, appellees were undoubtedly required so to file in prior years and their failure to do so, *has created a continuing presumption that the work was not done during those years.*

The foregoing seems so clear as hardly to require any

citation of authority. A brief check of the books fully confirms this proposition. We first direct attention to 59 Corpus Juris, Title "Statutes", Section 722, Page 1186:

> "However, the repeal of the statute will not operate to impair rights vested under it, or *to revive rights lost or taken away under the repealed statute,* or to affect acts performed or suits commenced, prosecuted and concluded under the former law.'

See also the California case of Perkins Manufacturing Co. v. Clinton Construction Co. 295 Pacific 1, on p. 4:

> "Appellant therefore contends that since the penalty has been removed and since it has now complied with the provisions of the 1927 act, it may maintain this action. The result reached by appellant is non sequitur. In the first place the whole argument is based upon the premise that the penalties imposed by the 1915 act merely served to render the contract unenforceable and not void but this premise as we have seen is incorrect. The contract herein involved was void as to appellant when entered into and performed. The rule in reference to repeal of statutes imposing penalties would seem to have no application to a contract rendered void by statute. *In other words, we are*

of the opinion that the repeal of a penalty rendering a contract void would not serve to revive the void contract."

We therefore submit that appellees cannot prevail here, whether the Waskey Act was impliedly repealed in 1938 or not.

APPELLANT'S THIRD POINT

(EXTENT OF IMPLIED REPEAL)

POINTS AND AUTHORITIES

I.

Where two acts are repugnant to or inconsistent with each other, the former will be deemed impliedly repealed by the latter to the extent, and only to the extent, of the inconsistency.

59 C. J. Title "Statutes", Sec. 517 p. 916.

ARGUMENT

It follows almost as of course from the rule that all presumptions are against an implied repeal and that two acts shall be construed so as to sustain both, if possible, (See 59 C. J. Section 518, Title Statutes p. 917-918 and authorities cited under Point I, Appellant's First Proposition, p. 12 supra) that where two acts are repugnant to or inconsistent with each other, the

former will be deemed impliedly repealed by the latter to the extent, and only to the extent, of the inconsistency. We quote the following from 59 C. J. Title Statutes, Sec. 517, p. 916:

> "Where there is a sufficient repugnancy or inconsistency between two statutes or parts of two statutes to effect a repeal by implication, the earlier statute is impliedly repealed to, and only to, the extent of the conflict, repugnancy or inconsistency."

An examination of the Waskey Act (Title 48, Sec. 384, U. S. C. A.) discloses at once that it covers two main propositions. First, it provides for the filing of proofs of labor and their contents and the presumption of performance arising from filing and non-performance from failure to file; and, second, it provides that upon failure to do the work the claim becomes automatically forfeited. It was this second phase of the act (the forfeiture provision) that the Circuit Court of Appeals in Thatcher v. Brown, 190 Fed. 708, held inconsistent with and to impliedly repeal the resumption of work clause in the general mining laws. We quote from p. 711:

> "Both acts expressly require $100 worth of work or improvements to be done or made on or for the benefit of each claim during each year but the consequences of a failure to complete such work or

improvements within the year are differently declared and such differences are irreconciliable. In the earlier act such failure is not declared to end the locator's right; but he is thereby given the right to resume the work after the expiration of the year provided there has been no other location in the meanwhile. By the later act no such permission is accorded and there is therein an express declaration that such failure works a forfeiture of the claim. *To that extent the prior law, so far as it affects claims in Alaska was necessarily repealed by the later one.*"

There is no provision in the general federal mining laws made applicable to Alaska by 48 U. S. C. A., Sec. 381, which provides for the filing of affidavits showing the performance of annual labor. Neither is there anything in such laws prohibiting the filing of such affidavits, so that the matter is left entirely to local legislation. See Lindley on Mines, 3rd. Ed. Vol. 1, Sec. 250, p. 546:

"Many of the states and territories, prior to their admission as states, have enacted codes more or less comprehensive, supplementing Congressional laws, while others have but few provisions. In the appendix will be found the legislation of this character now in force in each state."

"That a correct understanding of the general scope of the existing state and territorial legisla-

tion may be gleaned, we enumerate the subjects covered by such laws, indicating which states and territories have legislated upon the subject, *first considering those concerning which such legislation is unquestionably proper within reasonable limits.*"

Under sub-division 14 of this class (p. 560) is the following:

"(14) Authorizing the recording of affidavits of performance of annual labor."

And in Volume 2 of the same work, Section 636, pp. 1580 to 1585, is found a detailed discussion of the state laws providing for the filing of proofs of annual labor. Note on page 1581 that Alaska's Waskey Act is cited as placing Alaska in the same category as the others:

"This class of legislation is found in California, Colorado, Idaho * * * and has been provided by the Federal Government for Alaska (citing 34 Stat. at Large, Sec. 1243, - the Waskey Act.)."

Oregon for instance now has a proof of labor statute passed in 1939 (Sec. 108-314 and 108-315 O. C. L. A.) which closely follows the similar provisions of the Waskey Act. The prima facie presumptions arising from recording the proof of labor or failure to record it (Sec. 108-315) are identical. Yet in Oregon, as in many of the other states referred to by Lindley as having similar legislation, the doctrine of resumption

of work is in full force and effect. There is no provision for automatic forfeiture upon failure to do the work such as is found in the later clauses of the Waskey Act.

We have stressed this phase of the matter in order to show that the two aspects of the Waskey Act, that is the filing of proofs of labor and the presumptions from the filing or failure to file the same and the automatic forfeiture arising from non-performance are entirely severable and separate. One aspect of the Waskey Act, the automatic forfeiture provision, is inconsistent with the resumption of work doctrine of the general mining laws and, as held in Thatcher v. Brown, superceded that doctrine so far as it applied to Alaska, but the other aspect of the Waskey Act, the filing of proofs of annual labor and the presumptions arising in connection therewith are in no way inconsistent with the general mining laws and in no way dependent upon the forfeiture provision, as is shown by the fact that, as hereabove pointed out, several states in addition to Alaska, have proof of labor statutes substantially identical to Alaska's, with similar presumptions arising therefrom, where the doctrine of resumption of work is also recognized. We submit therefore that even if the 1938 amendment, making the general mining laws applicable to Alaska was held to repeal the forfeiture clause of the Waskey Act there is absolutely nothing

upon which to base the contention that it also repealed the proof of labor provisions of that Act.

The foregoing appears to be in accord with Judge Pratt's views the first time he held the Waskey Act to be impliedly repealed. See Koprivica v. Sather, 10 Alaska Reports, 593 on 597-8:

> "Consequently when the act of May 31, 1938 repeated the wording of Section 26 as passed June 6th, 1900, and left out any reference to the Waskey Act, it seems clear that Congress intended to make the general mining laws as they existed in 1938 control in Alaska over the Waskey Act *as to matters in which the two laws conflict,* i. e., as to the resumption of work after the failure to do annual labor. *The other provisions of the Waskey Act still remain in full force.*"

This time, however, as we understand his decision, Judge Pratt seeks to overcome the effect of this reasoning in two ways. First, he says that the word *claimant* as used in the clause of the Waskey Act, which provides: "But if such affidavit be not filed within the time fixed in this act the burden of proof shall be upon the *claimant* to establish the performance of such annual work and improvements," means the applicant for patent in the Land Office. (See 74 Fed. Supp. pp. 925-6) It is submitted that the fallacy of this reasoning will be at once apparent upon a little reflection.

The Waskey Act has nothing whatever to do with the procedings in the Land Office. It deals with annual assessment work and proofs of labor evidencing the same upon unpatented mining claims. The applicant in the Land Office may, or may not, be the claimant seeking to sustain the validity of the earlier location, depending upon whether the elder or junior locator applies for patent. In this case the appellant Lowe, owner of the junior locations, applied for patent. Judge Pratt's construction would place the burden upon her to show that annual labor was not done, but under the former provisions of the Act, the affidavit if timely and properly filed, "shall be prima facie evidence of the performance of the work". So, under Judge Pratt's construction, this is a case of "heads I win, tails you lose," and the burden would be upon the "claimant" here, the appellant Miss Lowe, to show that the work was not done, whether any affidavit was filed or not. In other words, the statute means nothing, On the other hand, if, instead of the junior locator applying for patent, the holder of the elder location applies (in this case the appellees) and the junior locator, the appellant Miss Lowe had adversed, then since the appellees would be the applicants in the Land Office, they would be the claimants according to Judge Pratt and the burden would be cast upon them to show the performance of the work if no proofs of labor were filed. So the burden of proof would shift back and forth between

the elder and junior locators, depending upon who happened to be the applicant for patent in the Land Office. This hardly seems to make sense either. Lastly, by construing the word claimant to mean applicant in the Land Office, Judge Pratt would limit the effect of the Waskey Act to suits or actions in support of adverse claims. That is, to cases where one of the parties had applied for patent in the Land Office, and the other was contesting his rights. But it may be pointed out that at least half and perhaps more than half of the litigation involving possessory rights to mining ground under conflicting locations is in cases where neither party has applied for patent. The Waskey Act is one of general application and there is certainly nothing in its wording that would justify an inference that it does not apply to all types of contests, yet according to Judge Pratt's construction the application of this provision would be limited to cases where one party or the other was "claimant" or applicant in the Land Office.

We submit, without further discussion, that the word "claimant" as used in the statute most obviously means the party claiming under the location for which the proof of labor is filed. The term "claimant" is commonly used in mining parlance to designate such party. It was used in this sense in all of the suspension acts filed during the depression years and in the moratoriums that followed our entry into World War II, including

the moratorium in effect for 1948. (Public Law 665, 80th Congress, Chap. 494, 2nd Session, Approved June 17, 1948.)

Judge Pratt's second contention on this point, if we understand him right, is that the provisions of the Waskey Act, providing for the filing of proofs of labor and the presumptions arising in connection with the filing of or failure to file the same, are inconsistent with the general mining laws and hence are impliedly repealed when the general mining laws were, as he states it, "again put forward" in 1938. (See 74 Fed. Supp. on 921 and 925) Such a contention is, of course, entirely at variance with the ideas of Lindley on the subject and it should be pointed out that if such a contention were sustained, not only would the Waskey Act be repealed, but the similar statutes in Idaho, New Mexico, and, since 1939, Oregon (see Sec. 108-315 O. C. L. A.) would also be nullified, because of course the Federal mining laws have always been applicable in such States and it fundamental that legislation enacted by the States contrary to the Federal mining laws is ineffective.

It is submitted that the Trial Court's fundamental error on this point lies in his conclusion that the general mining laws "provided in effect * * * (2) that the owner of a validly located mining claim *was presumed to have done the annual labor* and the burden of prov-

ing the contrary was upon any person asserting the same." (74 Fed. Supp. 920) It is submitted that while the second clause of this statement is undoubtedly correct in that the burden of proving the contrary is undoubtedly on the party so asserting, the first clause, which we have italicized, to the effect that the owner is presumed to have done the annual labor, is decidedly not correct, and finds no support in the authorities. The law does not presume that the owner of a claim has done the annual labor. There is no presumption on the subject one way or the other. Of course, as stated by the authorities cited in the Court's opinion, forfeiture is an affirmative defense and, like any other affirmative defense, the burden is upon the party asserting it to prove it. This ordinarily entails proving that the annual labor was not done. But this is a long way from saying that the law presumes it was done. For instance, in Case No. 5493, the second allegation in plaintiff's complaint (p. 2, Tr.) is that the plaintiff is a corporation organized under the laws of the State of Maine. If this allegation had been denied by the answer, the burden would be upon the plaintiff, since it had the affirmative of that issue, to prove that it was a Maine corporation, but the law would not *presume* that it was or was not. The law entertains no presumptions one way or the other, it simply says that the burden of proof is on the party having the affirmative of a particular issue. This

same fallacy of reasoning seems to be back of the following statement on page 926 of 74 Federal Supplement:

> "But even if the word "claimant" be interpreted to mean a party in court, affirmatively claiming that the annual labor was *one* (done) upon his claim, the Waskey Act would not place the burden of proof upon the plaintiffs in this case, because they never got to the point where they were claimants. As the plaintiffs showed valid locations of their mining claims, *the law raised the presumption that they did the annual labor upon the claims.* This presumption continued until the defendant made a prima facie showing that the annual labor was not done. Until such showing was made, and it never was made in this case, the plaintiffs were not required to say anything about annual labor and therefore were never to be classified as "claimants."

This statement is, we believe, fallacious and if followed would largely if not entirely nullify the presumption arising from failure to file provided for in the Waskey Act and similar statutes. As previously shown, the law does not presume that the annual labor was done on a mining claim, any more than it presumes the existence or non-existence of any other fact in issue. It simply says that if such a fact is alleged, the burden is

upon the party alleging it to prove it. That proof can ordinarily be accomplished in one of two ways. First, either by affirmative testimony to the effect that the annual labor was not done, or, secondly, by a showing of facts from which the law will presume it was not done, or which will shift the burden of proof upon the adverse party to show that it was done. Such is the effect of the Waskey Act and similar laws. Upon checking the codes in the mining states, it would appear that the statute most closely approximating this phase of the Waskey Act is the New Mexico Proof of Labor law. Some of the states, such as Idaho, and now Oregon, state in substance:

> "The failure to file such affidavit within said time will be consdered prima facie evidence that such labor has not been done.'

The New Mexico statute (see 89 Pacific, Page 287 and Vol. 3, Lindley on Mines, 3rd Ed., page 2514) states:

> "The failure to make and file such affidavit as herein provided * * * throws the burden of proof upon the owner or owners of such claim to show that such work has been done according to law."

At the time the Waskey Act was adopted in Alaska (March 2nd, 1907) there were apparently only two states, New Mexico and Idaho, who had this kind of law. Since the Idaho Statute, as above mentioned is

different, the conclusion seems inescapable that the Waskey Act was copied from New Mexico. This conclusion seems indesputable when the substantially identical wording of the statutes is considered, together with the fact that there was apparently no other law to be used as a guide. It may or may not also be significant to note that just a few days before the passage of the Waskey Act (on February 27, 1907) the Supreme Court of New Mexico, in the case of Upton v. Santa Rita Mining Co., (14 New Mexico 96, 89 Pacific 275 on p. 287 et seq.) construed the New Mexico Act and held that it shifted the burden of proof precisely as we are contending in the case of the Waskey Act:

> "This statute is unusual; New Mexico and Idaho being, as pointed out by Mr. Lindley (Lindley on Mines (2nd Ed) 636), apparently the only jurisdictions having such a law. As is said by the very thorough author: 'Ordinarily, the burden of proof rests with the party charging a forfeiture to show that the work has not been performed by the previous locator. In Idaho and New Mexico, where there is a failure to file the proof of annual labor, it would seem that this rule is modified and the burden is shifted. We cannot see any objection to this class of state legislation. The several states have a right to define the nature, degree, and effect of evidence within reasonable lines, and we do not think these provisions unreasonable.'

"In this case the proof shows that the holder of the Pinder claim made and filed an alleged proof of labor for 1897. But this, when tendered in evidence, was, upon objection, rejected by the Court as not made in conformity with section 2315, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1421). A comparison of it with the statute convinces us that the court below was correct in so holding. Indeed, that ruling is not questioned here. In legal effect, therefore, there was a failure by the owner of the claim to make and file the statutory proof, and this under the statute, threw upon it, and not upon plaintiff, the burden of proving that 'such work had been done according to law' * * * Had the defendant complied with the statute as to making its proof of labor, it would probably have been entitled to this instruction; but its failure to take this very simple precaution for the protection of its rights *imposed upon it,* and not upon its adversary, the burden of proof." (278-8)

It is therefore submitted that when the appellant proved or offered to prove, as was done in this case, that no proofs of labor or suspension notices were filed for a large number of the years intervening between the location of the claims in 1908 and 1938, under the provisions of the Waskey Act, the burden of proving that the annual labor had in fact been done during such

years, would rest upon the appellees. Since the appellees failed to offer any proof upon this point (see Exception No. 4, pp. 100 to 102, Tr.) appellant's motions for directed verdict etc. should have been sustained.

APPELLANT'S FOURTH PROPOSITION

(VARIANCE IN AND SUFFICIENCY OF SNOW SHOE FRACTION DESCRIPTION)

SUMMARY OF POINTS AND AUTHORITIES

I.

Current rulings do not permit laying the lines of a placer claim as distinguished from a quartz location over ground covered by prior locations.

Lindley on Mines, (3rd Ed) Volume 2, Section 448B, pp. 1055 to 1058;

Stenfield v. Espe (CCA 9th Cr.) 171 Fed. 825 on 827 to 829.

II.

Such a practice was never permitted on unsurveyed lands.

Lindley on Mines, 3rd Ed. p. 1056

ARGUMENT

As mentioned in the statement of the case, the Snow Shoe Fraction claim as set out in the complaint (Case

No. 5493) p. 3, Tr. of R., is alleged to cover a rectangular area of 350 feet by 1500 feet; containing approximately 10 acres and marked by four stakes, one at each of the four corners. (pp. 131-2, Tr.) As so located and staked, the Snow Shoe Fraction claim overlapped in large part certain prior locations known as the Miller Bench and Luloo and perhaps others, leaving the only vacant ground subject to appropriation by the Snow Shoe Fraction a small triangle containing approximately two and one-half acres. No subsequent amendment or re-staking of the Snow Shoe claim was claimed or shown. (p. 132 Tr.) The question is whether the Snow Shoe Fraction, under such circumstances, can be sustained as a valid location on this remaining 2½ acres. It is submitted that it cannot. As stated n Lindley on Mines, 3rd Edition, Section 448 B, pp. 1055 to 1058, at one time the Land Office showed a disposition to allow the locator of a placer claim to locate by legal subdivisions, excepting such portions as had been previously segregated by prior locations. On page 1056 it is stated: "This rule was held, however, to have no application to placer claims upon unsurveyed public lands." Of course the public surveys have not been extended to the Territory of Alaska. Mr. Lindley continues: "The attitude of the land department as announced in the Snow Shoe placer claim case, discourages if not inhibits the laying of the lines of a placer claim over prior claims." In any event, this Court has, in the case of Stenfield v.

Espe, 171 Fed. 825 on 828, expressly ruled that the boundaries of a placer claim, as distinguished from a quartz location, cannot be laid over prior claims. This case would appear to settle the matter and it is submitted without further discussion that the Snow Shoe Fraction location cannot be sustained. We stress again that the Snow Shoe Fraction location as now claimed and described in the findings and decree was never located or staked. What was located was an area some four times as large and of an entirely different shape, some three quarters of which was not subject to appropriation at all.

APPELLANT'S FIFTH PROPOSITION

(PROPRIETY OF ALLOWING ATTORNEY'S FEES)

ARGUMENT

As set out in the statement of the case, there is no allegation in either complaint regarding attorney's fees and no testimony or proof was offered upon the trial. The Trial Judge, nevertheless, of his own motion, inserted in the findings the recital to the effect that a reasonable sum to be allowed the plaintiff as attorney's fees was $500.00 and caused judgment for that amount, on account of attorney's fees, to be inserted in the decree. It is the appellant's contention that such an allowance was entirely improper under the circumstances and that

in order to be allowed, an award of attorney's fees must be supported by appropriate pleadings and proof, the same as any other fact. It is observed, on referring to the Alaska Code, that the provision for allowing attorney's fees was last added to the Alaska Statute by Chapter 84, p. 220 of the Laws of Alaska of 1947, which added to the existing cost statute the words: "And a reasonable attorney's fee to be fixed by the Court." It is further noted that Section 4065, Complied Laws of Alaska for 1933, contained this clause and it was subsequently deleted by the Laws of 1937, Chapter 58, p. 128. The writer cannot find where this attorney fee clause has ever been construed by this Court or any reported decision of the Alaska district courts. The provision, however, seems very similar to the provisions allowing attorney's fees in mechanics lien and condemnation cases. Such being the case, we will refer for our authority to the Oregon cases dealing with such attorney's fees, since it is our understanding that Oregon authorities are considered of quite persuasive force in Alaska, due to the similarity of the codes of the two jurisdictions. In State v. Ganong, 93 Oregon 440, the majority opinion commencing at p. 456 holds squarely that attorney's fees, to be allowable, must be alleged and proved. (184 Pacific on 237 et seq.) This was a condemnation case. To the same effect, see Columbia River Door Co. v. Todd, 90 Oregon 147 on 152 et seq. (175 Pac. 443) and Edwards v. Wirtz, 167 Oregon

625 on 639 (118 Pac. 2nd. 114) These last two cases were lien foreclosures. As is pointed out by these authorities, particularly the Ganong case, unless the amount of attorney's fees is alleged and proved, there is no way for the adverse party to have his day in court on this issue. The court would otherwise fix the fee from his own knowledge without evidence; in other words, act as sole witness and then pass on his own testimony, without any means being afforded to the losing party to be heard upon or secure a review regarding the amount of any such fees, which, as in this case, can, if the judge feels so inclined, be fixed at quite a substantial sum.

Respectfully submitted.

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